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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 496

WIEN ALASKA AIRLINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 23–25) is reported at 375 F. 2d 736.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1967. A timely petition for rehearing was denied on May 18, 1967. The petition for a writ of certiorari was filed on August 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was error to dismiss a third-party complaint seeking indemnification from the United States in a wrongful death action where, by reason of the

plaintiff's enjoyment of compensation under the Federal Employees Compensation Act, the United States was not liable in tort to the plaintiff.

STATUTES INVOLVED

The Federal Tort Claims Act provides in pertinent part:

> SECTION 1346. (28 U.S.C. 1346) United States as defendant.
>
> * * * * *
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> * * * * *
>
> SECTION 2674. (28 U.S.C. 2674) Liability of United States.
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The Federal Employees' Compensation Act, 39 Stat. 742, as amended, 5 U.S.C. (Supp. II) 8101, *et seq.*, provides in pertinent part:

> § 8116(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

STATEMENT

Petitioner, Wien Alaska Airlines, was sued for wrongful death by the widow of Kurt E. Backlund, an employee of the Federal Aviation Agency, who was killed in a crash of petitioner's plane in Alaska. Mrs. Backlund alleged that the crash was caused by petitioner's negligent operation, maintenance and control of the plane. Petitioner impleaded Anthony J. Narcisso, an F.A.A. Air Traffic Control Specialist, whom petitioner alleges supplied erroneous weather reports, as the result of which the pilot of the plane encountered weather conditions which did not permit visual flight. Petitioner also impleaded the United States,

alleging that it was liable under the Federal Tort Claims Act to indemnify petitioner for any recovery by Mrs. Backlund.

The third-party claim against the government was dismissed, and the dismissal was affirmed by the court of appeals,[1] on the ground that "a claim for non-contractual tort indemnity can be maintained only where there is tort liability on the part of the indemnitor to the person injured" (Pet. App. 25). Petitioner concedes that the United States is not liable in tort to Mrs. Backlund, a beneficiary under the Federal Employees' Compensation Act (5 U.S.C. 8101, *et seq.*) which provides, that "[t]he liability of the United States * * * under this subchapter * * * with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States * * * to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States * * * because of the injury or death" (5 U.S.C. 8116(c)).

ARGUMENT

The ruling below that petitioner may not recover indemnity from the United States for petitioner's liability, if any, for the death of Kurt Backlund is correct and is not in conflict with any decision

[1] In its order granting summary judgment in favor of the government, the district court, pursuant to F.R. Civ. P. 54(b), expressly determined that there was no just reason for delay, and directed the entry of judgment. Thus the judgment was appealable.

of this Court or any court of appeals. Further review is therefore unwarranted.

1. Petitioner claims the right to indemnity, not under a contract or implied warranty arising out of a contractual relationship, or a mutual duty established by admiralty law, but rather under the Federal Tort Claims Act, 28 U.S.C. 1346(b). A precondition of governmental liability under the Federal Tort Claims Act is that a private employer must be liable in like circumstances. 28 U.S.C. 1346(b), 2674. It is clearly the general rule that, as held below, a private employer would be liable for non-contractual tort indemnity "only where there is tort liability on the part of the indemnitor to the person injured" (Pet. App. 25). See, *e.g.*, *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 139 (C.A. 2), certiorari denied, 341 U.S. 915; *Hunsucker* v. *High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768, 776 (1953). While there are no Alaska cases directly in point, the Alaska law appears to conform to the established rule applied elsewhere that the indemnitor's independent tort liability to the plaintiff is a precondition to tort indemnity.[2] Cf. *Spaeth* v. *Journal Printing Co.*, 16 Alaska 149, 155, 139 F. Supp. 188, 191 (D. Alaska) ("a person who has discharged a tort claim *to which he and others were subject* may be entitled to indemnity or contribution from the others") (dictum; emphasis added).

The rule that liability for indemnity requires an independent liability to the plaintiff in tort has

[2] That the liability of the United States for indemnity turns on whether a private person would be liable under like circumstances is established by *United States* v. *Yellow Cab Co.*, 340 U.S. 543.

been applied frequently in a context indistinguishable from the present one. Thus a private employer who, by virtue of the exclusivity provision of a State workmen's compensation statute, or of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905, is not liable in tort to his employee, also is not liable for indemnity to a third party sued by the employee.[3] If the executor or administrator of the estate of petitioner's pilot sued the United States under the Federal Tort Claims Act and the pilot were covered by the Alaska workmen's compensation statute, it seems clear that the United States could not sue petitioner for indemnity.[4]

The petition strenuously attacks the rule that the indemnitor's tort liability is a prerequisite of indemnity. However, in order to recover indemnity from the

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[3] *E.g.*, *American Mut. Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322 (C.A. 2); *Husted* v. *Consumers Power Co.*, 376 Mich. 41, 135 N.W. 2d 370 (1965); *Bankers Indemnity Ins. Co.* v. *Cleveland Hardware & Forging Co.*, 77 Ohio App. 121, 62 N.E. 2d 180, appeal dismissed, 145 Ohio St. 615, 62 N.E. 2d 251 (1945); *A. O. Smith Corp.* v. *Associated Sales & Bag Co.*, 16 Wis. 2d 145, 113 N.W. 2d 562 (1962); *Smither & Co., Inc.*, v. *Coles*, 242 F. 2d 220 (C.A.D.C.), certiorari denied, 354 U.S. 914; *LoBue* v. *United States*, 188 F. 2d 800 (C.A. 2); *Standard Wholesale Phosphate & Acid Works, Inc.* v. *Rukert Terminal Corp.*, 193 Md. 20, 65 A. 2d 304 (1949); *Williams Bros. Lumber Co.* v. *Meisel*, 85 Ga. App. 72, 74–75, 68 S.E. 2d 384, 388 (1951). See, contra, *Boston* v. *Old Orchard Business District, Inc.*, 26 Ill. App. 2d 324, 168 N.E. 2d 52 (1960); *Hendrickson* v. *Minnesota Power & Light Co.*, 258 Minn. 368, 376, 104 N.W. 2d 843, 849 (1960).

[4] The exclusivity clause in the Alaska Workmen's Compensation Act is virtually identical to the exclusivity clause in the F.E.C.A. See Alaska Statutes § 23.30.055; *Gordon* v. *Burgess Const. Co.*, 425 P. 2d 602 (Alaska 1967).

United States in this action under the Federal Tort Claims Act, it is not sufficient for the petitioner to urge (Pet. 12) that the rule absolving private employers of liability in like circumstances is "illogical and unsound"—a point that we do not concede; rather it must be shown that private employers would be liable for indemnity in like circumstances. This petitioner plainly cannot do.[5]

2. It also is manifest that *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, does not sustain petitioner's position. The sole question decided there was "whether the historic admiralty rule of divided damages in mutual fault collisions has been qualified * * * by the exclusive liability provision of the federal compensation statute" (372 U.S. at 600). Thus, *Weyerhaeuser*, in holding that the exclusivity provision did not qualify the divided damages rule to which private shipowners and the United States alike had long been subject, clearly did not decide whether a private employer would be liable for tort indemnity where he

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[5] Petitioner's contention (Pet. 20) that the decision below represents an "abrogation of a common law right of indemnity" ignores the fact that there is no "common law right of indemnity" in the absence of an independent tort liability by the indemnitor.

In this regard, we believe that petitioner's reading of the decision below, and of the earlier decision in *United Air Lines, Inc.*, v. *Wiener*, 335 F. 2d 379 (C.A. 9), certiorari dismissed, 379 U.S. 951, is not wholly accurate. A careful reading of *Wiener* shows that the holding is not that Congress intentionally barred such indemnity suits by enacting the exclusive liability clause, but rather that the negation of tort liability running from the government to its employee, eliminates one of the prerequisites for tort indemnity at common law. See 335 F. 2d at 402.

did not share a common tort liability with the party seeking indemnification.

Petitioner relies heavily on the language in *Weyerhaeuser* (372 U.S. at 601) that "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties." But that language is not a holding that third parties may not be affected by the exclusivity provision in circumstances where exclusivity clauses traditionally have negated indemnity actions. There is no reason to suppose that Congress intended the exclusivity provision it inserted in the F.E.C.A. in 1949 to have a different effect than similar provisions of other statutes, as construed in numerous judicial decisions over many years prior to 1949.[6] As pointed out in *Busey* v. *Washington*, 225 F. Supp. 416, 423 (D.D.C.), to permit a third party to recover indemnity in such circumstances would undercut the purpose of the F.E.C.A.—or of any similar workmen's compensation system—to provide not only for employees "a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." *Bradford Elec. Co.* v. *Clapper*, 286 U.S. 145, 159. The Senate Report accompanying the 1949 legislation observed:

[6] The Senate Report, in discussing the express exclusivity provision, indeed specifically notes that "Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy." S. Rep. No. 836, 81st Cong., 1st Sess., p. 23. While Congress was immediately concerned with suits by employees against the United States, and intended specifically to preclude them from suing, see *Weyerhaeuser S.S. Co.* v. *United States*, *supra*, there is no reason to assume that Congress did not intend the provision to have the same effect as the "[w]orkmen's compensation laws, in general" to which the Senate Report refers.

> * * * needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill. [S. Rep. No. 836, 71st Cong., 1st Sess. (1949), p. 23.]

The Ninth Circuit was the first court of appeals to deal with the indemnity issue since the *Weyerhaeuser* decision. It rejected petitioner's contentions in *United Air Lines, Inc.* v. *Wiener,* 335 F. 2d 379, 402–404, certiorari dismissed, 379 U.S. 951. Subsequently, the Court of Appeals for the Eighth Circuit expressly approved the decisions of the Ninth Circuit in the present case and in *Wiener*. *Maddux* v. *Cox* (C.A. 8, No. 18567, September 6, 1967). Prior to *Weyerhaeuser,* the courts had uniformly ruled that the F.E.C.A. barred tort indemnity suits. *Drake* v. *Treadwell Const. Co.,* 299 F. 2d 789 (C.A. 3), vacated, 372 U.S. 772; *Underwood* v. *United States,* 207 F. 2d 862 (C.A. 10); *Christie* v. *Powder Power Tool Corp.,* 124 F. Supp. 693 (D.D.C.). There is, therefore, no conflict between the circuits.[7]

[7] Petitioner points out (Pet. 14–17) that the decision below is contrary to the decision of the United States District Court for the Western District of Pennsylvania on remand in *Drake* v. *Treadwell Const. Co., supra* (Civ. Action No. 14517, Order of June 20, 1963). However, that case was settled before an appeal was perfected, in accordance with a stipulation dated September 13, 1963, which specified that it did "not constitute an admission of liability or fault on the part of the * * * United States." Subsequent to settlement, the United States Attorney filed a motion to dismiss the appeal referred to by petitioner (Pet. 15),

3. *United States* v. *Gilman*, 347 U.S. 507, is inapposite. That case dealt "not with the liability of the United States, but with the liability of its employees." 347 U.S. at 509. The Court held only that the government may not recover indemnity from an employee for whose negligence it has been held liable where Congress had not authorized such indemnification. Surely nothing in that holding supports the proposition that petitioner can recover indemnity from the United States where the government is not liable in the underlying tort action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1967.

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which erroneously stated that the Solicitor General "has recommended against appeal."

In *Hart* v. *Simons*, 223 F. Supp. 109 (E.D. Pa.), as petitioner notes (Pet. 15), the plaintiff rather than the government sought dismissal of the third-party complaint. The government did not, however, waive its right to contend at a later stage that the F.E.C.A. barred the suit for indemnity. Hart and Simons ultimately settled their suit, with the settlement providing for dismissal of the third-party complaint; thus the government paid nothing. Civil No. 27953 (E.D. Pa.), Stipulation of Dismissal filed Nov. 2, 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1967